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**IN THE
COURT OF APPEALS OF INDIANA**

ROCKY L. SMITH,

Appellant-Respondent,

vs.

BEVERLY SMITH,

Appellee-Petitioner.

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No. 78A04-0609-CV-477

APPEAL FROM THE SWITZERLAND SUPERIOR COURT

The Honorable John D. Mitchell, Judge

Cause No. 78D01-0301-DR-00016

APRIL 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Respondent-Appellant Rocky L. Smith appeals from the trial court's issuance of a writ of assistance in favor of Petitioner-Appellee Beverly Smith. We reverse and remand with instructions.

ISSUE

The following issue is dispositive: whether the trial court erred in issuing a writ of assistance when possession was relinquished to the purchaser of property.

FACTS AND PROCEDURAL HISTORY

Rocky and Beverly owned a home and fifty acres of real estate at the time of their separation. As part of the distribution of marital property in the dissolution of marriage decree, the trial court ordered the home and acreage to be sold by a commissioner. Thereafter, an agreed order was entered whereby Rocky was to keep forty-seven acres of the real estate. After Rocky had the property surveyed to indicate the boundaries of the divided estate, the commissioner held a public auction to sell the home and remaining three acres.

Beverly purchased the home and three acres at the public auction. However, after being told that a portion of the leach lines of the home's septic tank was located on Rocky's forty-seven acres, Beverly filed a writ of assistance. In the writ, Beverly asked the trial court to order Rocky to sell an additional acre to her so that she would own the land the leach lines were on. The trial court granted the writ upon the basis that the drawing of the boundary lines between the parties was due to a mutual mistake of the parties. Rocky now appeals.

DISCUSSION AND DECISION

Rocky contends that the trial court did not have authority to issue a writ of assistance in this matter. He emphasizes that Beverly did not receive the home and three acres as part of the dissolution decree but as a purchaser at a public auction.

At the outset, we note that Beverly failed to file an appellee's brief. When such a failure occurs, we do not undertake the burden of developing arguments for the appellee. *See State Farm Insurance v. Freeman*, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). Applying a less stringent standard of review, we may reverse the trial court if the appellant establishes prima facie error. *Id.* "Prima facie" is defined as "first sight," "on first appearance," or "on the face of it." *Butrum v. Roman*, 803 N.E.2d 1139, 1142 (Ind. Ct. App. 2004), *trans. denied*. The purpose of this rule is not to benefit the appellant but "to relieve this court of the burden of controverting the arguments advanced for reversal where the burden rests with the appellee." *Freeman, id.*

"A writ of assistance is an equitable remedy normally used to transfer real property, the title of which has been previously adjudicated, as a means of enforcing the court's own decree." *TeWalt v. TeWalt*, 421 N.E.2d 415, 418 (Ind. Ct. App. 1981). A writ is a summary proceeding and is not the institution of a new suit; "rather it is auxiliary or incidental to judgment or decree, and employed to enforce or effectuate such judgment." *Id.* (quoting *City of Chicago v. Walker*, 61 Ill.App.3d 1050, 377 N.E.2d 1214, 1216 (1978)). The crucial issue in a writ of assistance proceeding is the right to possession of the property involved as determined under the decree. *Id.*; *State Department of Natural Resources v. Winfrey*, 419 N.E.2d 1319, 1321 (Ind. Ct. App.

1981). The basis of a writ of assistance is the power of the trial court to give effect to its adjudications without resort to other courts. *See generally*, 7 C.J.S. Assistance, Writ of § 1 (2004).

The use of a writ of assistance may have been appropriate in the present case if Beverly had been awarded the house and three acres in the trial court's decree, and Rocky had refused to give her possession of the property. However, the commissioner sold the property in a public auction, as directed to do so in the trial court's decree. Beverly successfully bid on the property as an "as is" transaction, and she was awarded possession. The decree was fulfilled when the commissioner conducted the public auction and possession was relinquished to the successful bidder. There was therefore no need to issue a writ of assistance, and the trial court erred in doing so.

We are conscious that we should not elevate form over substance. However, we have not done so in this case. As the successful bidder for the property, Beverly occupied the position of a third party purchaser, not as the party of the decree. Therefore, even if we treated Beverly's request for a writ of assistance as a request for modification of the decree, she would not prevail.

CONCLUSION

The trial court erred in granting Beverly's request for a writ of assistance. We reverse and remand with instructions that the trial court vacate its order.

Reversed and remanded with instructions.

BAILEY, J., and ROBB, J., concur.